No. 17-1657

IN THE

Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC.,
Petitioner,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The question here is what it means to "reject" an executory contract under §365 of the Bankruptcy Code. Is rejection the equivalent of a pre-bankruptcy breach of contract by the debtor? Or—as Tempnology argues (at 1)—is rejection an "extraordinary authority" to revoke *all* rights and interests the counterparty ever acquired under a contract, even those that would be unaffected by a pre-bankruptcy breach?

The Code answers that question: "[T]he rejection of an executory contract ... constitutes a breach of such contract ... immediately before the date of the filing of the petition." §365(g)(1). "Breach" means exactly what

it does at common law: a party's failure to fulfill its unperformed contractual obligations, giving the counterparty a claim for damages or other relief. Rejection thus enables the trustee to free the estate from the debtor's future performance obligations, while giving the counterparty a pre-petition claim for its resulting damages. But rejection cannot strip the counterparty of rights that a pre-petition breach would not affect. By definition, a breach relates only to contractual obligations *that have not yet been performed*. A breach does not allow the breaching party to undo past performance, unwind completed transactions, or take back interests in property already conveyed. Neither does rejection.

Say that, outside bankruptcy, one party sells another a toaster and, in the same contract, agrees to deliver a loaf of bread every week for two years. One year into the contract, the seller can breach: It can stop delivering bread and pay damages. But the seller's breach does not let it reclaim the toaster. As the seller, "I can yell 'I breach!' all I want, but I cannot force [the buyer] to give me the [toaster] back." Baird, *Elements of Bankruptcy* 118 (6th ed. 2014) ("Baird"). Because rejection is a breach, the same is true if the contract is rejected in bankruptcy: The estate can stop delivering bread, but it cannot take back the toaster. *Id.* at 118-119. Likewise, because "[o]utside of bankruptcy, a licensor's breach does not terminate a licensee's right to use intellectual property," rejection cannot terminate that right either. *Sunbeam Prods., Inc.* v. *Chicago Am. Mfg.*, 686 F.3d 372, 376-377 (7th Cir. 2012).

In Tempnology's view, however, rejection lets the debtor take back the toaster—or the right to its intellectual property—and sell it to someone else, even though the debtor could never accomplish that by

breaching its unperformed obligations outside bankruptcy. The great majority of courts and scholars have repudiated that view of rejection. It flouts the statute's plain text. It confuses rejection with the trustee's limited power to avoid certain pre-bankruptcy transactions. And it contravenes the Code's most fundamental interpretive principle: Parties' substantive rights in bankruptcy are governed by applicable non-bankruptcy law unless the Code clearly provides otherwise. In short, Tempnology's view of rejection is "fundamentally contrary to general bankruptcy principles, to the history and purpose of executory contracts doctrine itself, and to common sense." Andrew, *Executory Contracts in Bankruptcy*, 59 U. Colo. L. Rev. 845, 849 (1988) ("Andrew").

All this is set out in Mission's opening brief. Tempnology has little to offer in response. Lacking any textual foothold in the statute, it relies on a snippet of out-of-context language from *Bildisco* that has no bearing on the question here. It attempts to draw from §365's structure a negative inference regarding Congress's intent that is refuted by context, history, and Congress's own contemporaneous explanations of its actions. And it argues that reorganizing would be easier if debtors could trample other parties' rights. But the Bankruptcy Code respects those rights, and courts are bound by Congress's judgment.

Tempnology also claims that trademark licenses are different from other contracts and that licensees' rights must therefore disappear upon rejection. But the distinctions Tempnology cites are immaterial; it never explains why they justify a special rule of rejection for trademark licenses.

Finally, Tempnology argues this case is moot. It is not. The question presented encompasses all Mission's rights under the parties' agreement. And even if it were limited to Mission's trademark rights, Mission is seeking damages for the loss of those rights following rejection. While Tempnology argues Mission is not entitled to damages, that is an argument on the merits of Mission's claim, not an argument for mootness.

ARGUMENT

I. REJECTION DOES NOT TERMINATE CONTRACTS OR REVOKE PROPERTY INTERESTS CONVEYED PRE-BANKRUPTCY

A. Rejection Is A Breach, Not An Avoidance Power

Tempnology contends (at 18, 29) that rejection is a "unique power within bankruptcy" to terminate an executory contract and "reduce[] all of the non-debtor's non-bankruptcy rights"—including interests in the debtor's assets conveyed to the counterparty before bankruptcy—"to a 'claim' for monetary damages." Tempnology is wrong. Pet. Br. 16-35.

1. The Code specifies that rejection "constitutes a breach" of the contract "immediately before the date of the [bankruptcy] filing." §365(g). Tempnology never comes to grips with that crucial statutory language. It argues (at 29-30) that §365(a)'s use of the word "reject," rather than "an existing concept from non-bankruptcy law," shows Congress "intentionally created a unique power" to modify the substantive rights of parties to a contract. But §365(g) defines "rejection" as a "breach"—a well-understood "existing concept from non-bankruptcy law." That clear statutory text is fatal to Tempnology's argument.

Likewise, Tempnology contends (at 28-32) that "rejection ... reduces all of a non-debtor counterparty's non-bankruptcy rights" to a pre-petition damages claim. In support of that argument, it emphasizes that the term "claim" is broad and includes all liability for damages caused by rejection, and it argues that "the *entire* contract" must be assumed or rejected. But those points simply beg the question what effect rejection has on the counterparty's rights—they do nothing to answer the question.

As explained, rejection is a breach of the debtor's as-yet unperformed obligations under the contract, not a revocation of past performance. Damages from the breach of those future obligations—including "unmatured," "contingent," or "unliquidated" damages, §101(5)—are treated as a pre-petition claim and may be discharged in bankruptcy, §1141. In that sense, rejection "reduces" the counterparty's *right to the debtor's future performance* to a pre-petition claim. But it does not follow that all the counterparty's *other* rights acquired under the contract vanish (or are "reduce[d]" to a pre-petition claim) upon rejection. Rejection does not affect rights that breach outside bankruptcy would not affect.[1]

One important facet of that principle is that rejection is not an avoidance power. If a debtor transfers an interest in its property—such as a lien, lease, or license—to a counterparty before bankruptcy, the debtor's property enters the estate subject to the counterparty's interest. *Board of Trade of City of Chicago* v.

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[1] *City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 299 U.S. 433 (1937), is not to the contrary. It simply holds that a debtor-tenant's *unpaid future rent* under a rejected lease is a pre-petition claim that can be discharged.

Johnson, 264 U.S. 1, 11 (1924).[2] Rejection cannot undo the transfer and take back the interest in property. That can be accomplished only through a fraudulent-transfer, preference, or other avoidance action under §§541-550 of the Code. And such actions can be brought only in narrow circumstances—such as when the debtor, while insolvent, transferred its property for less than reasonably equivalent value, reducing the assets available to pay creditors. §548(a)(1)(B); Pet. Br. 25-26.

Tempnology claims (at 48-49) that references to "avoidance" are "red herrings." But on Tempnology's view, rejection *does* operate as avoidance, clawing back interests in property previously transferred to the counterparty. Tempnology argues rejection differs from avoidance because it gives the counterparty an unsecured pre-petition claim. But avoidance gives the transferee at least that, §502(h), and in the case of a good-faith transferee of a fraudulent transfer, gives the transferee more than that: a lien on the recaptured property for the full value it paid, §548(c). On Tempnology's theory, rejection takes back interests in property that could not be reclaimed through the Code's avoidance provisions and gives the counterparty cents on the dollar in return. That is not how rejection—or

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[2] Tempnology's efforts (at 46-47) to evade *Chicago Board of Trade* are feeble. Tempnology says the case is old, but it established a foundational bankruptcy principle that "remains good law" today. Baird 96-97; Pet. Br. 24-25, 28-29, 37. And Tempnology's complaint that it did not involve rejection misses the point. The case holds that the debtor's assets enter the estate subject to other parties' rights—whatever form those rights may take—that would limit the debtor's use of those assets outside bankruptcy. Tempnology's view violates that principle by permitting rejection to expand the estate's interests in property beyond what the debtor had.

the Bankruptcy Code in general—works. Simply put, the Code respects non-bankruptcy property rights. *Butner* v. *United States*, 440 U.S. 48, 55 (1979); Pet. Br. 19-29.

2. Lacking a stronger basis for its novel view, Tempnology relies (at 28-30) on a misreading of *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513 (1984). It seizes on *Bildisco*'s statement that the collective bargaining agreement at issue in that case was "not an enforceable contract," *id.* at 532. It then leaps to the conclusion that rejection extinguishes all rights the counterparty ever acquired under the contract, leaving it a pre-petition damages claim as its sole remedy. *Bildisco* did not hold—or even suggest—any such thing.

In *Bildisco*, the debtor-in-possession stopped paying certain wages and benefits under a CBA before deciding to assume or reject it under §365. 465 U.S. at 517-518. The NLRB found that the debtor-in-possession had unilaterally terminated provisions of a CBA that was "in effect" and thus violated the National Labor Relations Act. *Id.* at 519-520 & n.5. *Bildisco* held that a debtor-in-possession does not violate the NLRA by failing to adhere to a CBA's terms before it is assumed or rejected. *Id.* at 531-534. The Court noted that Chapter 11 gives debtors-in-possession a window of time to assume or reject a contract, and NLRB proceedings during that window would constrict that "breathing space." *Id.* at 532. And it reasoned that rejection of the CBA would "constitute[] a breach" deemed to occur immediately before filing and redressable through a pre-petition claim. *Id.* at 530-532. Accordingly, it concluded "that from the filing of a petition in bankruptcy until formal [assumption], the [CBA] is not an enforceable contract *within the meaning of [the] NLRA*." *Id.* at 532 (emphasis added).

Tempnology dramatically overreads *Bildisco*. *Bildisco* held only that before the assumption or rejection of a CBA, it could not be enforced against the debtor-in-possession *under the NLRA*. It did not hold that a rejected contract is never enforceable in any way; rather, it recognized that rejection is a breach of the debtor's future obligations, giving rise to a pre-petition claim. (After all, an unenforceable agreement cannot be breached.) *Bildisco* certainly did not hold that rejection retroactively terminates all the counterparty's rights under an executory contract, including interests in assets—such as an intellectual-property license—conveyed before bankruptcy.

B. Section 365(n) And Similar Provisions Do Not Suggest That Rejection Terminates Contracts Or Avoids Interests In Property

With no affirmative basis in the text for its position, Tempnology attempts to draw a negative inference from §365's structure. It notes that certain subsections of §365—(h), (i), and (n)—expressly state that rejection does not affect the counterparty's rights in estate assets. Tempnology asserts (at 33-41) that these "exceptions" prove the existence of a "general rule" that rejection "terminates" such rights—although the purported "general rule" appears nowhere in the statute. In fact, no such "general rule" exists, and the subsections Tempnology relies on refute, rather than bolster, its view of rejection.

1. Tempnology ignores the overwhelming evidence that Congress adopted §365(n) to correct *Lubrizol Enterprises* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). *Lubrizol* wrongly held that rejection terminated a patent licensee's rights, leaving the licensee only a pre-petition damages claim. As the

Senate Report explained, §365(n) "make[s] clear" that rejection is merely a "breach ... of affirmative ongoing performance," and "cannot ... unilaterally cut off" licensees' "rights ... to use the licensed property"—"a result ... never intended by Congress in enacting [§]365." S. Rep. No. 100-505, at 3200-3201 (1988); Pet. Br. 45-50.

Tempnology argues that if Congress had believed *Lubrizol* was wrongly decided, it would have revised §365's general provisions rather than adding an "exception." But the House Report explained that, while a "comprehensive re-working of [§]365" might be the "best way in the long run of dealing with" the issue, *Lubrizol*'s "chilling effect" on intellectual-property licensing was a "serious[] ... problem" that required an urgent fix "now." H.R. Rep. No. 100-1012, at 3-4 (1988). Congress responded to that problem by clarifying the law in the area of immediate concern, rather than revamping the entire statutory scheme. Pet. Br. 47-48.

2. The other "exceptions" Tempnology cites were similarly enacted to make clear that rejection does not deprive counterparties of all interests acquired under a rejected contract, often overruling judicial decisions that interpreted rejection too broadly. None of the so-called "exceptions" was viewed as *changing* the law or creating a special exemption from a general rule of termination; all were treated as *clarifying* the law's application to certain types of contracts.

For instance, the protections for lessees of real property now embodied in §365(h) were initially enacted in 1938 as §70(b) of the Bankruptcy Act, in response to uncertainty regarding the effect of rejection on les-

sees' rights.[3] Section 70(b) provided that a landlord's rejection "shall not deprive the lessee of his estate"—that is, the tenant would not lose the right of possession. The provision's principal drafter explained that it would clarify that rejection permits a landlord to "repudiate ... obligations" "such as ... repairs" but does not "forfeit[] the tenant's [leasehold] estate." McLaughlin, *Amendment of the Bankruptcy Act*, 40 Harv. L. Rev. 583, 609 (1927); National Bankruptcy Conference, *Analysis of H.R. 12889*, 74th Cong., 2d Sess. 227-228 & n.3 (Comm. Print 1936) (§70(b) is "clarifying"); Andrew 861 n.75, 902-903.

But the phrase "shall not deprive the lessee of his estate" continued to generate divergent interpretations. Report of Commission on Bankruptcy Laws, H.R. Doc. No. 93-137, pt. II at 153, 157 (1973) ("Commission Report"). Accordingly, when the Bankruptcy Code was adopted in 1978, §70(b) was replaced with §365(h), which provided, more clearly, that rejection did not revoke the lessee's right to "remain in possession" of the property (including for "any renewal or extension of such term that is enforceable" under nonbankruptcy law). H.R. Rep. No. 95-595, at 349 (1977) ("Thus the tenant will not be deprived of his estate"); S. Rep. No. 95-989, at 60 (1978) (same); Andrew 903 n.200. In 1994, Congress further clarified §365(h), overruling cases holding that rejection terminated the lessee's rights "in or appurtenant to the real property" (such as

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[3] *Compare American Brake Shoe & Foundry Co.* v. *New York Rys. Co.*, 278 F. 842, 843-844 (S.D.N.Y. 1922) (receiver for landlord can stop furnishing utilities under lease but cannot evict tenant), *with Coy* v. *Title Guarantee & Trust Co.*, 198 F. 275, 279-282 (D. Or. 1912) (receiver for landlord can terminate tenant's occupancy notwithstanding right of renewal).

rental terms, subletting, and assignment). H.R. Rep. No. 103-835, at 45 & n.12 (1994).

Likewise, when the Code was adopted in 1978, Congress enacted §365(i), which responded to concerns about decisions stripping buyers in possession of real property purchased under land-sale contracts of their interests in the property. Commission Report, pt. I at 199, pt. II at 158; Lacy, *Land Sale Contracts in Bankruptcy*, 21 UCLA L. Rev. 477, 478-485 (1973) (urging legislation to overturn decision holding rejection terminated purchaser's equitable interest in property); Andrew 906-912. And in 1984, Congress amended §365(h) and §365(i) by adding similar protections for timeshare purchasers, overruling contrary decisions. S. Rep. No. 98-65, at 50 (1983) ("[t]his ... legislation is urgently needed" because "[c]ourts have refused" to recognize timeshare purchasers' rights).

That history of enacting specific responses to specific concerns has doubtless resulted in a statute less elegant than one written on a blank slate. But today's Bankruptcy Code is a palimpsest: the result of an accretion of statutory provisions enacted over many decades, overlaid on an even older common-law base. It is not always simple to sweep away all traces of a term with deep historical roots. Congress's choice to correct misinterpretations, and provide tailored solutions to problems, as they arose—rather than start from scratch to redraft a central provision of the Code—should not obscure the plain meaning of "rejection" as the statute itself defines it.

3. Tempnology also cherry-picks a few words from §365 that it claims support its view. They do not.

First, Tempnology notes (at 34-35) that §365(h), (i), and (n) allow the counterparty to treat a rejected con-

tract as "terminated"—purportedly showing that under the "default rule," rejection is termination. In fact, those provisions confirm that rejection is a breach, not a termination.

Specifically, (h), (i), and (n) give the right to "terminate" a rejected contract to the *counterparty*, not the *trustee*. Those provisions reflect the basic contract principle that a material breach entitles the *non-breaching* party to treat the contract as terminated or continue performance and seek breach-of-contract damages. Neither §365 nor contract law permits the *breaching* party to use its own breach to declare the contract terminated. Pet. Br. 39-40, 44.

Second, Tempnology notes that §365(g) begins with the phrase "[e]xcept as provided in subsections (h)(2) and (i)(2),"[4] which it claims shows that the rights counterparties retain under subsections (h) and (i) are "exceptions" to §365(g)'s "general rule" of termination. This, too, is wrong.

Section 365(g) states that "[e]xcept as provided in subsections (h)(2) and (i)(2), the rejection of an executory contract ... constitutes a breach of such contract" giving rise to a damages claim. Subsections (h)(2) (now (h)(1)(B)) and (i)(2), in turn, provide that a counterparty that retains its rights under a rejected contract has no claim for damages from rejection (except a right of set-off). Those subsections are thus exceptions to the general rule that rejection gives rise to a claim for breach-of-contract damages—*not* to a general rule of termination.

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[4] Section 365(g)'s cross-references were not conformed after the 1984 amendments. "Subsection (h)(2)" thus refers to what is now subsection (h)(1)(B).

Notably, subsections (h)*(1)* (now (h)(1)(A)) and (i)*(1)* are *not* excepted from §365(g). And it is *those* subsections that recognize the counterparty's right to "remain in possession" of the property. Thus, the provisions affirming that the counterparty's rights survive rejection are *not* exceptions to §365(g)'s "general rule"—further evidence that §365(g) cannot mean what Tempnology claims.

4. Tempnology also relies (at 35-36) on §1113. That provision overruled *Bildisco*'s holding that a debtor-in-possession could breach a CBA before rejection without violating the NLRA's prohibition on unilateral termination of a CBA's terms. 465 U.S. at 519 & n.5, 532-534; 29 U.S.C. §185(d). Section 1113 provides that a trustee may *not* "unilaterally terminate or alter any provision of a [CBA]" without first complying with a detailed bargaining process over a modified CBA and demonstrating the modifications are necessary to the reorganization, §1113(f), unless the court delays unduly in ruling on the rejection motion, §1113(d)(2).

Tempnology claims that the word "terminate" *in §1113* "confirm[s]" that rejection *under §365* terminates all rights a counterparty acquires under a contract. It does not. Rejection under §1113 is quite different from rejection under §365. Rather than constituting a "breach" of an existing contract, rejection under §1113 abrogates the existing CBA and replaces it with a new one. Courts have recognized that key difference: "[U]nder §365, if a debtor rejects an executory contract, 'it does not completely terminate the contract,'" which remains in force. *In re Northwest Airlines Corp.*, 483 F.3d 160, 170 (2d Cir. 2007). But "[c]ontract rejection under §1113, unlike contract rejection under §365, permits more than non-performance; it allows one party, with the court's approval, to establish *new*

terms." *Id.* at 171. Far from showing that rejection under §365 amounts to termination, §1113 shows the opposite: Congress knew how to provide for termination when it wanted, and it did not do so in §365.

5. Finally, the *expressio unius* and superfluity canons (Resp. Br. 37-41) do not help Tempnology. Those canons recognize that when Congress creates exceptions to a general rule, it is typically reasonable to infer that Congress does not intend other exceptions, or for the rule to apply so broadly that it swallows the exceptions. But those inferences are reasonable only if the underlying premise—that Congress *has* created exceptions to a contrary general rule—is correct. Here, the premise is not correct: Subsections (h), (i), and (n) are not "exceptions" to a "general rule" of "termination." Rather, they clarify the application of the general rule that rejection is a breach to specific contracts.

Moreover, *expressio unius* is not a mechanical rule that trumps other indications of a statute's meaning. "The force of any negative implication ... depends on context," and "the *expressio unius* canon ... can be overcome by 'contrary indications that [the language] was probably not meant to signal any exclusion.'" *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 381 (2013). Tempnology's wooden application of the canon fails because it altogether ignores context—the other words of the statute, the statute's history, and basic bankruptcy principles. And its argument is no stronger with respect to trademark licenses. Pet. Br. 45-50.

The canon against superfluity likewise does not support Tempnology. A provision is "not ... superfluous if Congress included it to remove doubt"—which is the case here. *Marx*, 568 U.S. at 385. Moreover, (h), (i),

and (n) do more than remove doubt. The consequences of breach are normally governed by state law. Subsections (h), (i), and (n) create bankruptcy-specific remedial schemes for particular categories of contracts, which benefit the licensee by eliminating uncertainty but differ in certain respects from state law. For instance, those provisions limit the counterparty's remedy for the breach (no damages beyond setoff in (h) and (i), damages but no setoff in (n)). Recognizing that rejection is a breach hardly turns a specific federal remedy for that breach into surplusage.[5]

C. Bankruptcy Policy Does Not Support Tempnology

Tempnology argues (at 41-42, 58-62) that empowering debtors-in-possession to terminate trademark licenses would maximize the marks' value and facilitate reorganization. But the Bankruptcy Code does not permit anything and everything that might further reorganization. Congress did not "'ha[ve] a single purpose in enacting'" the Code; rather, it balanced multiple competing interests through the careful and reticulated scheme set out in the statute. *Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008). In §365, Congress enabled estates to avoid the burden of continuing performance under executory contracts, but

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[5] Tempnology objects (at 40) that if the general rule is "more favorable to licensees" than §365(n), licensees would never "choose the statutory 'exception.'" But even if the general rule were viewed as more favorable, licensees are not entitled to "choose." If a licensee falls within §365(n), §365(n) provides its sole remedy. "'It is a commonplace of statutory construction that the specific governs the general.'" *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (debtor could not proceed under more favorable general provision when plan fell within more restrictive specific provision).

it did not grant the power to take back rights already conveyed—even if that would make reorganizing easier. Pet. Br. 55-56.

Tempnology also invokes (at 42-43) equality of distribution among creditors. Respecting a licensee's rights in the debtor's intellectual property does not violate that policy, but upholds it. Bankruptcy aims to treat *similarly situated* creditors alike, but not all creditors are similarly situated. A creditor with an interest in the debtor's property conveyed before bankruptcy has a right to that property that is superior to that of other creditors. *Chicago Board of Trade*, 264 U.S. at 11. Outside bankruptcy, a debtor's other creditors could not seize a licensee's rights in the debtor's intellectual property to satisfy a debt. The same is true in bankruptcy: Absent a fraudulent transfer, a debtor's other creditors are not entitled to a licensee's rights. Recognizing that those rights persist after rejection thus gives the licensee only its due. Baird 96, 120-122.

II. Rejection Of The Agreement Did Not Terminate Mission's Rights

A. Rejection Did Not Terminate Mission's Trademark Rights

1. As demonstrated, rejection affords the estate no greater rights than the debtor would have if it breached the contract outside bankruptcy. Tempnology fails to dispute—and thus concedes—that it could not have revoked Mission's trademark license by breaching its obligations under the agreement outside bankruptcy. It follows that Tempnology could not do so by rejecting the agreement in bankruptcy. That is sufficient to resolve the issue of Mission's trademark rights.

2. Rejection also could not have terminated Mission's trademark license because the license is an interest in Tempnology's property that, under the principle of *Chicago Board of Trade*, never entered the bankruptcy estate and can be reclaimed only through an avoidance action.[6]

Tempnology contends that a non-exclusive trademark license is not an "interest in property" under trademark law. That is both wrong and irrelevant. At the outset, there is no question that a trademark is property and a license to use the trademark is an interest in that property. The leading treatise flatly states that "[a] trademark is a property right." 1 *McCarthy on Trademarks and Unfair Competition* §2:10 (5th ed. 2017) ("*McCarthy*"). It is "a bundle of rights in intellectual property" in "the same way" that "a 'fee simple' in real estate" is a "bundle of legal rights." *Id.* And, "like any 'property right,'" a trademark can be "bought and sold (assigned) and rented out (licensed)." *Id.* Of course, a licensee does not *own* the licensed trademark. But a licensee has an interest in the trademark nonetheless, just as a renter has a leasehold interest in real estate without owning it. 3 *McCarthy* §18:52 (analogizing trademark license to real-property lease).

Tempnology argues that a trademark is a unique form of property, in which the "sticks in the bundle" of

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[6] Mission does not argue, as Tempnology suggests (at 44-45), that because a contract can be characterized as "property," all rights under the contract are therefore "interests in property." Rejection breaches the counterparty's right to receive the debtor's future performance and substitutes damages. But when a contract conveys an interest in a *distinct underlying asset*—real property, personal property, or intellectual property—before bankruptcy, that asset enters the estate subject to the counterparty's interest, and rejection does not claw that interest back.

property rights can never be separated. Not so. Trademarks differ from other intellectual property in that their value comes from their status as signifiers of quality, and thus they cannot be sold without the business's goodwill. Relatedly, as Tempnology stresses, trademark licensors must exercise quality control over their licensees or risk abandonment of the mark. But it does not follow that a licensee cannot have a property interest in a trademark. That is what a license is—the grant of an interest in the licensed property. *See, e.g.*, *Krebs Chrysler-Plymouth, Inc.* v. *Valley Motors, Inc.*, 141 F.3d 490, 498 (3d Cir. 1998) (under applicable state law, "[t]rademarks are property, and franchises are licenses to use such property"; therefore, "franchises are interests in property").[7]

In any event, the relevant question is not whether a trademark license is an interest in property under trademark law, but whether it is an interest in property under bankruptcy law. *Chicago Board of Trade*, 264 U.S. at 8-10; Pet. Br. 23-25, 37. And, crucially, Tempnology never disputes that, outside bankruptcy, it could not have sold or assigned the trademarks free of Mission's license—demonstrating that the license is, for bankruptcy purposes, a property interest in the trademarks themselves, not a mere "contract right." Andrew 920-924; Pet. Br. 37-38; *Krebs*, 141 F.3d at 498 (trademark license is interest in property for bankruptcy purposes); *In re GGW Brands, LLC*, 504 B.R. 577, 592-593, 630-631 (Bankr. C.D. Cal. 2013) (same); *In re Specialty Foods of Pittsburgh*, 91 B.R. 364, 374 (Bankr.

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[7] It does not matter whether the license is exclusive or non-exclusive. Tempnology argues that the hallmark of a property interest is the right to exclude. Here, however, Tempnology gave that right up by licensing its marks to Mission, relinquishing a stick in its "bundle of legal rights." 1 *McCarthy* §2:10.

W.D. Pa. 1988) (same). Tempnology's trademarks thus entered the bankruptcy estate subject to Mission's rights, and rejection could not expand the estate's rights by revoking Mission's license.

As for Tempnology's parade of horribles (at 58-60) trumpeting the harm to trademark owners if licensees' rights are respected, suffice it to say that every association of trademark owners and professionals that has weighed in on this case has the opposite view. It is Tempnology's proposed rule that will harm trademark licensors and licensees alike, making licensees' rights uncertain and hampering licensors' ability to commercialize their intellectual property.

3. Tempnology also complains (at 32-33, 52, 61-62) that Mission is not entitled to an administrative claim for the post-petition violation of its rights. That argument reflects Tempnology's basic misunderstanding of rejection. Rejection is a breach of the debtor's future performance obligations deemed to occur pre-petition, requiring the resulting damages to be asserted as a pre-petition claim. Here, however, Mission's claim does not arise from Tempnology's deemed *pre-petition* breach of its future performance obligations—which is all that rejection can lawfully accomplish—but from the estate's *post-petition* interference with rights Mission lawfully retained after rejection. Under basic bankruptcy principles, when the estate takes actions post-petition that wrongfully injure a third party, the estate's liability to that party is an administrative expense. §503(b)(1)(A); *Reading Co.* v. *Brown*, 391 U.S. 471, 483-485 (1968).

B. Rejection Did Not Terminate Mission's Exclusivity Rights

1. Again, Tempnology does not dispute that it could not have revoked Mission's exclusivity rights by breaching the parties' agreement outside bankruptcy (instead wrongly arguing (at 61) that the effect of breach outside bankruptcy is irrelevant). Tempnology thus could not revoke Mission's exclusivity rights by rejecting the agreement in bankruptcy. That is sufficient to resolve the issue.

2. Likewise, rejection could not terminate Mission's exclusivity rights because they are an interest in Tempnology's property conveyed before bankruptcy. The parties' agreement gave Mission the exclusive right to sell certain products practicing Tempnology's patents within the United States. Tempnology contends (at 60) that this was merely a contractual "distribution" right, not a "license" to intellectual property, but as this Court established long ago, "[a]ny language used by the owner of the patent ... consent[ing] to [another's] use of the patent in ... selling it ... constitutes a license." *De Forest Radio Tel. Co.* v. *United States*, 273 U.S. 236, 241 (1927). And Tempnology does not contest that, outside bankruptcy, it could not have sold or assigned its intellectual property free of Mission's exclusivity rights. Pet. Br. 42-44. Tempnology's estate stood in no better position, and rejection did nothing to change that.

3. Tempnology wrongly contends (at 21-23) that Mission's exclusivity rights are outside the question presented. This Court denied review of the First Circuit's holding that Mission's exclusivity rights were not exclusive "right[s] to intellectual property" protected

by *§365(n)*. The issue here, however, is rejection's effect on Mission's exclusivity rights under *§365(g)*.

That issue is squarely encompassed by the question presented: "Whether a debtor-licensor's rejection of a license agreement—which 'constitutes a breach of such contract,' 11 U.S.C. §365(g)—terminates rights of the licensee that would survive the licensor's breach under applicable non-bankruptcy law." Pet. i. Mission's exclusivity rights are "rights of the licensee" under the contract, and the question whether rejection terminated them is "fairly included" within the question presented. S. Ct. R. 14.1(a). The petition made that clear several times (at 15 n.4, 20, 25-26), not only in a footnote. This Court thus has the discretion either to determine the application of the legal rule it articulates to Mission's exclusivity rights, or to leave that exercise to the courts below on remand.

III. This Case Is Not Moot

This is a live dispute. Mission suffered an "actual injury"—the estate's post-petition interference with its rights—that can "be redressed" by a reversal. *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013). Mission unquestionably has a concrete interest in the outcome of this dispute—a claim for money damages. Such claims are virtually never moot. 13C Wright et al., *Federal Practice and Procedure* §3533.3 (3d ed. 2018). This case is no exception.

Tempnology argues (at 21-27) that this Court rendered this case moot by granting certiorari only on question 1. Tempnology effectively concedes that Mission's claim for the violation of its exclusivity rights remains live, but argues that Mission's exclusivity rights fall outside the question presented. And, Temp-

nology claims, Mission's trademark rights are not sufficient to keep this case alive because Mission purportedly suffered no damages from the violation of those rights, and the estate may be administratively insolvent. According to Tempnology, it is now "impossible for the [C]ourt to grant any effectual relief."

Each step of this reasoning is wrong. As discussed above, Mission's exclusivity rights are "fairly included" within the question presented, which encompasses all "rights of the licensee" under the parties' license agreement—not just trademark rights.

In any case, Mission's claim with regard to its trademark rights is not moot either. By seeking and obtaining an unlawful order that Mission was not entitled to use the trademarks post-rejection, the estate deprived Mission of the incremental profits Mission would have earned had it been able to use them. As Mission explained below, it "suffered damages as a result of its inability to use the trademarks after the rejection." JA572.[8]

Tempnology argues that Mission suffered no damages because it never used the trademarks after rejection—a strange argument, since that is precisely why Mission *did* suffer damages. And it claims that since the bankruptcy court did not formally enjoin Mission's use of the trademarks—but merely issued an order

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[8] Tempnology contends (at 3-4) that Mission's initial proof of claim did not specifically assert damages for the post-rejection loss of its trademark rights. But there was no requirement—and no reason—for Mission to break down its damages that way. Its proof of claim included all damages attributable to the violation of its rights under the license agreement. JA556-557. In any event, if Mission prevails in this appeal, it will assert an administrative claim for its post-rejection damages; its proof of claim will not circumscribe the damages to which it is entitled. §503(a).

providing Mission had no legal right to use them—Mission was required to use the trademarks and risk contempt of court or else forfeit any damages. Tempnology offers no support whatever for this argument. In any event, it is irrelevant. Boiled down, Tempnology's contention is merely that, on the merits, Mission is not entitled to damages. And a dispute over the merits of a claim—assuming that claim is not completely frivolous, as Mission's is not—does not make that claim moot. It is settled law that "whether [the plaintiff] has established a right to recover" and "his prospects of success are ... not pertinent to the mootness inquiry." *Chafin*, 568 U.S. at 174.

Finally, Tempnology suggests (at 27) that Mission cannot obtain "effectual" relief because the estate's cash has been distributed to S&S. But "the fact that a defendant is insolvent does not moot a claim for damages." *Chafin*, 568 U.S. at 175-176. And here, Mission has multiple potential sources of recovery. Mission has appealed the order distributing the cash to S&S, which could be required to return it if Mission prevails. JA190. Mission could also seek an order requiring other administrative claimants to disgorge their recoveries to permit a pro rata distribution among all administrative claimants, including Mission. §§502(j), 726(b). In addition, Mission has asserted a claim directly against S&S for damages for the post-rejection deprivation of its rights, which has been stayed pending this Court's resolution of this case. JA133, 178.

In short, this case is not moot.

CONCLUSION

The First Circuit's judgment should be reversed.

Respectfully submitted.

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